Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

J.R.Y., individually and as the administrator of the estate of his minor son, B.M.Y. and T.S.Y., mother of B.M.Y.
Petitioners,

vs.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Lawrence N. Curtis, Esq.
LAWRENCE N. CURTIS, LTD.
(A Professional Law Corporation)
300 Rue Beauregard, Bldg. C
Post Office Box 80247
Lafayette, Louisiana 70508
Telephone: (337) 235-1825
Facsimile: (337) 237-0241

Attorney for Petitioners, J.R.Y. and T.S.Y.

QUESTIONS PRESENTED

1) Were petitioners entitled to defend the decision in the district court on any grounds supported by the law and the record below?

2) Where petitioners have instituted a claim in a state court for personal injuries and damage caused when petitioners' son was brutally sodomized at a summer camp operated by respondent, may respondent circumvent the thirty (30) day time requirement for removal established by 28 U.S.C. § 1446(b), by bringing a separate and distinct action under the Federal Arbitration Act concerning the same transaction or occurrence?

3) Where respondent sold a policy of whole life insurance to petitioners' minor son, which contained an arbitration clause, did the parties intend for the arbitration clause to apply to a claim for personal injuries and damage caused when petitioners' son was brutally sodomized at a summer camp operated by respondent, even though the claim is not related to the terms and conditions of the insurance policy?

4) Where state insurance law prohibits mandatory arbitration of claims against insurers and provides that all arbitration clauses are null, void and unenforceable if incorporated by reference into a life insurance policy, does reverse preemption of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, et seq.

occur under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

J.R.Y., individually and as the administrator of the estate of his minor son, B.M.Y. and T.S.Y., mother of B.M.Y.

Represented by Lawrence N. Curtis, Esq., LAWRENCE N. CURTIS, LTD., 300 Rue Beauregard, Bldg. C., Lafayette, Louisiana 70508

Respondent (plaintiff and appellants below):

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

Represented by Jeremy Fitzpatrick, KUTAK ROCK LLP, 1650 Farnam Street, Omaha, NE 68102-2186

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The opinion of the Court of Appeals (Appendix A) is reported at 320 Fed. Appx. 216 (5th Cir. La. 2009). The decision of the district court granting the petitioners' motion to dismiss (Appendix B) and the order of the court of appeals denying the petition for rehearing and rejecting the suggestion for hearing *en banc* (Appendix C) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on March 23, 2009. The Court denied the petitioners petition for rehearing and rejected the suggestion for rehearing en banc on May 19, 2009. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

STATUTORY PROVISION AT ISSUE

The underlying civil action was instituted by petitioners on October 31, 2007, in Louisiana state court, for personal injuries and damage caused when petitioners' son was brutally sodomized at a summer camp operated by respondent. Thereafter, respondent did not file a notice of removal within the delays provided for by 28 U.S.C. § 1446.

28 U.S.C. § 1446 reads, in pertinent part, as follows:

> § 1446. Procedure for removal
>
> (a) A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal ... containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based....

Instead, respondent some sixty-five (65) days after service of petitioners' state law claim, filed a civil action, involving the same transaction or occurrence, in federal district court pursuant to the Federal Arbitration Act, 9 U.S.C. § 4:

> 9 U.S.C. § 4, in pertinent part, reads as follows:
>
> A party aggrieved by the alleged

> failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

In this civil action, respondent asserted diversity jurisdiction, 28 U.S.C. § 1332(a)(1), which reads, as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--
>
> (1) Citizens of different States;

The petitioners allege that the district court's decision to dismiss respondent's motion for a temporary restraining order and motion to compel arbitration was proper, because respondent failed to file a notice of removal within the delays provided for by 28 U.S.C. § 1446.

The petitioners further allege that the Federal Arbitration Act has been reverse preempted under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which reads, in pertinent part, as follows:

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance....

To be sure, the petitioners claim reverse preemption based on La.R.S. 22:629, which reads, in pertinent part, as follows:

> **§ 22:629. Limiting actions; jurisdiction**
>
> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, or any group health and accident policy insuring a resident of this state regardless of where made or delivered, shall contain any condition, stipulation, or agreement:
>
> * * *
>
> (2) ***Depriving the courts of this state of the jurisdiction of action against the insurer.***
>
> * * *
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract. [Emphasis added.]

La.R.S. 22:629 is read, in *para materia*, with La.R.S. 22:867 and 22:299. La.R.S. 22:867 provides:

> "No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance, or it is incorporated in the policy or other written evidence of insurance by specific reference to another policy or written evidence of insurance."

La.R.S. 22:299 provides:

> "Every life ... insurance certificate ... shall meet the standard contract provision requirements not inconsistent with the Subpart for like policies issued by life insurers in this state...."

STATEMENT OF THE CASE

The underlying civil action was instituted by petitioners on October 31, 2007, in Louisiana state court, for personal injuries and damage caused when petitioners' son was brutally sodomized at a summer camp operated by respondent. Thereafter, respondent neither filed an answer in the Louisiana state court, nor did it file a notice of removal within the delays provided for by 28 U.S.C. § 1446. Instead, respondent some sixty-five (65) days after service of

petitioners' state law claim, filed a civil action, involving the same transaction or occurrence, in federal district court pursuant to the Federal Arbitration Act. In this civil action, respondent asserted diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Simultaneously, respondent filed a motion to compel arbitration and a motion for a temporary restraining order to stay the Louisiana state court proceedings brought by the petitioners.

Thereafter, the petitioners filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), on grounds that (1) respondent's complaint to compel arbitration was simply a thinly-veiled attempt to accomplish an untimely "backdoor removal" of a pending state court action, and (2) the parties, notwithstanding respondent's present claim, never -- ever -- contemplated that the arbitration clause in question applied to a claim for personal injury not related to the terms and conditions of respondent's whole life insurance policy.

On March 13, 2008, the district court denied the respondent's motion for a temporary restraining order, found the respondent's motion to compel arbitration moot, and granted the petitioners' motion to dismiss under 12(b)(6) of the Federal Rules of Civil Procedure. On April 14, 2008, the respondent filed a Notice of Interlocutory Appeal from the district court's order. The statutory basis for jurisdiction of the Court of Appeals was 28 U.S.C. § 1291, in that this was an appeal from a decision of the district court denying respondent's motion for a temporary restraining order and to compel arbitration.

The United States Court of Appeals for the Fifth Circuit reversed the decision of the district court in an unpublished opinion filed on March 23, 2009. (Appendix A) Thereafter, on May 19, 2009, that Court denied the petitioners' petition for rehearing and rejected the suggestion for rehearing en banc. (Appendix C) "Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed.R.App.P.and 5TH CIR. R 35), the Petition for Rehearing En Banc is DENIED." (App. 15).

REASONS FOR GRANTING CERTIORARI

In the first instance, the Court of Appeals ignored well-settled decisional law of this Court, when it refused to allow petitioners to defend the decision in the district court on any grounds supported by law and the record below.

Second, this case squarely presents the question whether or not a party made a defendant in a personal injury claim brought in state court, can circumvent the statutory time period for the removal of a state court proceeding by asserting -- in a separate action brought in federal district court -- its defense -- under the Federal Arbitration Act.

Third, this case also presents the question whether or not the federal presumption in favor of

arbitration mandates that an arbitration clause, which is incorporated, by reference, in a contract of whole life insurance, can be invoked to compel arbitration of anything other than a dispute between the insurer and the insured concerning the terms and conditions of the policy of whole life insurance.

Fourth, this case also presents the question whether or not a state insurance law, which prohibits, as against public policy, a mandatory arbitration clause in a life insurance policy and provides that any arbitration clause in a life insurance policy is null, void and unenforceable triggers reverse preemption and, therefore, place the insurer and insured in the same exact position they would have occupied in the absence of the arbitration clause.

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1. THIS COURT'S DECISIONS HAVE MADE IT CRYSTAL CLEAR THAT THE PETITIONERS WERE ENTITLED TO DEFEND THE DECISION IN THE DISTRICT COURT ON ANY GROUNDS SUPPORTED BY LAW AND THE RECORD BELOW

The petitioners take the essential position that it is well-settled that "[w]here the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." J. E. Riley Inv. Co. v. Commissioner, 311 U.S.

55, 59; 61 S. Ct. 95; 85 L. Ed. 36 (U.S. 1940).[1] A corollary of this well-settled principle of judicial review is that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." Dandridge v. Williams, 397 U.S. 471, 475, n. 6; 90 S. Ct. 1153; 25 L. Ed. 2d 491 (1970).[2] It is respectfully submitted that the Court of Appeals deviated from this Court's established precedent, when it refused to take into account all of the petitioners' arguments advanced in support of the district court's decision.

2. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE DISTRICT COURT'S DECISION BASED ON THE FACT THAT RESPONDENT FAILED TO FILE A NOTICE OF REMOVAL BEFORE THE EXPIRATION OF THE LEGAL DELAYS ESTABLISHED BY 28 U.S.C. § 1446.

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[1]See also, *Ryerson v. United States*, 312 U.S. 405, 408; 61 S. Ct. 656; 85 L. Ed. 917 (1941)("As the Government has not sought certiorari it cannot attack the judgment below, but it is free to sustain it upon any legal ground which will support it."); *Helvering v. Gowran*, 302 U.S. 238, 245; 58 S. Ct. 154, 82 L. Ed. 224 (1937)("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.")'

[2]See also, *Smith v. Phillips*, 455 U.S. 209, 215, n.6; 102 S. Ct. 940; 71 L. Ed. 2d 78 (1982)("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

Here, the underlying civil action was instituted by petitioners on October 31, 2007, in Louisiana state court, for personal injuries and damage caused when petitioners' son was brutally sodomized at a summer camp operated by respondent. (App. 31) Respondent was served (through its General Counsel) on November 19, 2007. (App. 16) Thereafter, respondent neither filed an answer in the Louisiana state court, nor did it file a notice of removal within the delays provided for by 28 U.S.C. § 1446. Instead, respondent some fifty-two (52) days after service of petitioners' state law claim, filed a civil action, involving the same transaction or occurrence, in federal district court pursuant to the Federal Arbitration Act. In this civil action, respondent asserted diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Simultaneously, respondent filed a motion to compel arbitration and a motion for a temporary restraining order to stay the Louisiana state court proceeding brought by the petitioners.

Thereafter, the petitioners filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), on grounds that, among other things, respondent's complaint to compel arbitration was simply a thinly-veiled attempt to accomplish an untimely "backdoor removal" of a pending state court action.

To be sure, 28 U.S.C. § 1446 reads, in pertinent part, as follows:

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to

> remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal ... containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based....

28 U.S.C. § 1446 is clear and unequivocal that the notice of removal of a civil action must be filed within thirty days after service of the initial pleadings and, therefore, the district court was well within its discretion to dismiss the respondent's motion for a temporary restraining order and motion to compel arbitration.

3. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE DISTRICT COURT'S DECISION, BECAUSE THIS COURT HAS MADE IT PLAIN THAT THE FEDERAL PRESUMPTION IN FAVOR OF ARBITRATION DOES NOT MANDATE A CONCLUSION THAT AN ARBITRATION CLAUSE, WHICH IS INCORPORATED, BY

REFERENCE, IN A CONTRACT OF WHOLE LIFE INSURANCE, MUST BE INVOKED TO COMPEL ARBITRATION OF ANYTHING OTHER THAN A DISPUTE BETWEEN THE INSURER AND THE INSURED CONCERNING THE TERMS AND CONDITIONS OF THE POLICY OF WHOLE LIFE INSURANCE.

In order to determine whether or not a motion to compel arbitration act under the Federal Arbitration Act should be granted, this Court has enunciated a two-step analysis. The first step, in the two-step analysis, is a determination of whether the parties have agreed to arbitrate the dispute in question. In EEOC v. Waffle House, Inc., 534 U.S. 279,293-294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), this Court explained:

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989). See also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n. 12, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967) ("The purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so"). Because the FAA is "at bottom a policy guaranteeing

> the enforcement of private contractual arrangements," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. Id. at 626. While ambiguities in the language of the agreement should be resolved in favor of arbitration, Volt, 489 U.S. at 476, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." Id. at 479. [Footnote omitted.]

In this case, the certificate of insurance provides that it "will be governed by the laws of the state in which it is delivered." (App. 32) As will be discussed in more detail below, Louisiana law prohibits, as against public policy, any mandatory arbitration clause in a life insurance policy and provides that any arbitration clause in a life insurance policy is null, void and unenforceable. Therefore, as a matter of Louisiana law, petitioners did not -- could not -- agree to arbitrate any dispute concerning the policy of life insurance issued by the respondent. On the contrary, the essential transaction in this case involved the purchase of a life insurance policy, nothing more and nothing less.

The second step, in the two-step analysis, is to

determine whether the dispute in question falls within the scope of that arbitration agreement. The arbitration agreement in this case reads, in pertinent part, that:

> "... members ... [can] seek ... resolution of any dispute regarding any individual rights or individual interests they have or claim to have as members ... without the delay and expense of formal legal proceedings."

In this case, there can be no doubt about the fact that the petitioners' tort claim can be maintained without reference to the life insurance contract that they entered into with the respondent. The petitioners are not seeking benefits under the life insurance contract. They are asserting rights that are available to all children in Louisiana, whether or not they are members of the respondent's fraternal organization. By operation of law, all children in Louisiana have a right to be free from sexual molestation and are entitled to claim damages for violations of that right under La.Civ.Code Art. 2315. The life insurance policy that the petitioners purchased on behalf of their minor child has nothing whatsoever to do with such claims.

Moreover, the arbitration provision asserted by the respondent is limited to "disputes regarding any individual rights or individual interests they have or claim to have as members, benefit certificate owners, beneficiaries or payors ... for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or

benefit certificate owner or beneficiary or payor." (App. 34)

The claim asserted by the petitioners does not fall within the parameters of that limiting language. Any doubt in that regard must be resolved in favor of the petitioners, because "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995). In Louisiana, it is well-settled, that "[i]f there is a provision in a contract that seems ambiguous or subject to more than one interpretation, it must be interpreted against the party who wrote the text." St. Mary Operating Co. v. Champagne, 06-984 (La.App. 3 Cir. 12/06/06); 945 So. 2d 846, 851.

4. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE DISTRICT COURT'S DECISION, BECAUSE LOUISIANA INSURANCE LAW TRIGGERS REVERSE PREEMPTION. TO EXPLAIN, LOUISIANA INSURANCE LAW PROHIBITS, AS AGAINST PUBLIC POLICY, ANY MANDATORY ARBITRATION CLAUSE IN A LIFE INSURANCE POLICY AND PROVIDES THAT ANY ARBITRATION CLAUSE IN A LIFE INSURANCE POLICY IS NULL, VOID AND UNENFORCEABLE. THEREFORE, IN THIS CASE, THE INSURED AND INSURER ARE PLACED IN THE SAME EXACT POSITION THEY

WOULD HAVE OCCUPIED IN THE ABSENCE OF AN ARBITRATION CLAUSE.

Here, the Federal Arbitration Act has been "reverse preempted" by La.R.S. 22:629(A)(2), which makes the arbitration clause at issue void and unenforceable.

The McCarran-Ferguson Act states in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012.

In this case, reverse preemption under the McCarran-Ferguson Act is appropriate because (1) there is no question that the FAA does not relate specifically to the business of insurance, (2) La.R.S. 22:629 was enacted for the purpose of regulating the business of insurance, and (3) the application of the FAA to enforce the arbitration provision would invalidate La.R.S. 22:629.

To be sure, La. 22:629 reads, in pertinent part, as follows:

> § 22:629. Limiting actions; jurisdiction
>
> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, or any group health and accident policy insuring a

> resident of this state regardless of where made or delivered, shall contain any condition, stipulation, or agreement:
>
> * * *
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> * * *
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract. [Emphasis added.]

In Hobbs v. IGF Ins. Co., 2002-26 (La.App. 3 Cir. 10/23/02); 834 So. 2d 1069, 1071, writ denied, 2002-2869 (La. 01/31/03); 836 So. 2d 71, the Louisiana Court of Appeal, Third Circuit explained that:

> Louisiana courts have consistently held that compulsory arbitration clauses in contracts of insurance are unenforceable under this statute because they operate to deprive Louisiana courts of jurisdiction of the action against the insurer. See Doucet v. Dental Health Plans Management Corporation, 412 So. 2d 1383 (La.1982); see also, Macaluso v. Watson, 171 So. 2d 755 (La.App.4 Cir. 1965) which applied the prohibition against arbitration clauses retroactively to a claim against an insurance company under the uninsured

> motorist provision and Spillman v. US Fidelity and Guaranty Company, 179 So. 2d 454 (La.App.3 Cir. 1965).
>
> It is clear, in Louisiana, arbitration clauses in contracts of insurance are prohibited as a matter of public policy because if enforced would deny Louisiana citizens free access to its courts - a right guaranteed by the state's constitution.

And, althcugh the respondent refers to its contract with the petitioners as a "certificate of insurance," a review of the "certificate of insurance" easily shows that it is, in fact, a contract of life insurance, which was issued and delivered in Louisiana to a Louisiana resident, as specified in La.R.S. 22:629(A) (App. 28-41) and by its very terms is "governed by the law of the state in which it was delivered," namely, the State of Louisiana. (App. 32) Furthermore, under PART 2 - THE CONTRACT, the "certificate of insurance" provides:

> "CONTRACT
>
> The contract between the member and Woodmen consists of:
>
> - This certificate
> - The written application, a copy of which is attached to this certificate.
> - The Articles of Incorporation of Woodmen.
> - The Constitution and Laws of Woodmen
>
> The Articles of Incorporation and the Constitution and Laws and any

> amendments to them are binding on the member and the beneficiary but will not take away or reduce any benefits of this certificate
>
> This certificate is granted in consideration of the application and the timely payment of premiums." (App. 32)

Furthermore, the "certificate of insurance" incorporates, by reference, respondent's Articles of Incorporation and Constitution and Laws. (App. 34) Under Louisiana law, La.R.S. 22:867, the Articles of Incorporation and Constitution and Laws, are a part of the policy of life insurance. In pertinent part, La.R.S. 22:867 provides:

> "No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance, or it is incorporated in the policy or other written evidence of insurance by specific reference to another policy or written evidence of insurance."

In consequence, the respondent's arbitration clause is void and unenforceable as it violates Louisiana public policy.

Further, the respondent contends that as a fraternal benefit society, it is specifically excluded from the Louisiana Insurance Code's definition of "insurer" which includes "every person engaged in the business of making contracts of insurance, other than

a fraternal benefit society." However, the respondent cannot find any solace in this fact, because La.R.S. 22:299, which governs certificates of insurance issued by fraternal benefit societies, reads in part that:

> "Every life ... insurance certificate ... shall meet the standard contract provision requirements not inconsistent with the Subpart for like policies issued by life insurers in this state...."

In other words, the life insurance policy issued by the respondent is treated, under Louisiana insurance law, no different than any policy of life insurance issued in the state. The arbitration clause, incorporated by reference, on which the respondent now relies, is void. In consequence, the petitioners and the respondent are placed in the same exact position they would have occupied but for this arbitration clause; that is, the petitioners are entitled to maintain their action in state court under Louisiana tort law.

CONCLUSION

The decision of the Fifth Circuit violates established precedent of this Court and should be reversed.

DATED: August 17, 2009

Respectfully submitted,

LAWRENCE N. CURTIS, ESQ.
(Louisiana Bar Roll No: 04678)
LAWRENCE N. CURTIS, LTD.

Attorney for Petitioners,
J.R.Y. and T.S.Y.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30405

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY/OMAHA WOODMEN LIFE INSURANCE SOCIETY

Plaintiff-Appellant

v.

JRY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF HIS MINOR SON, ON BEHALF OF BMY ESTATE; TSY, MOTHER OF BMY

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
(6:08-CV-46)

Before GARWOOD, DENNIS, and PRADO, Circuit Judges.

GARWOOD, Circuit Judge:*

Plaintiff-appellant, Woodmen of the World Life Insurance Society/Omaha Woodmen Life Insurance Society (the Society), appeals the denial of its motion to compel arbitration and to stay ongoing state proceedings pending arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3, 4. Because we find that the parties' underlying dispute arguably falls within the scope of the arbitration clause at issue in this case, we reverse and remand with instructions to the district court to grant the motion to compel arbitration and to stay the state proceedings.

STANDARD OF REVIEW

We review *de nova* a district court's denial of a motion to compel arbitration under 9 U.S.C. § 4 as well as the denial of a motion to stay a proceeding pending arbitration under 9 U.S.C. § 3. *Tittle v. Enron Corp.*, 463 F.3d 410, 417 (5th Cir. 2006).

FACTS AND PROCEEDINGS BELOW

The Society is a non-profit "fraternal benefit society" that, in addition to offering life insurance coverage, also provides a number of ancillary privileges and benefits to its members, including access to

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR R. 47.5.4.

Woodmen facilities and activities. It is organized under Nebraska law and licensed to do business in Louisiana and many other states.[1] T.S.Y. applied to the Society for a life insurance policy on behalf of her minor son, B.M.Y., who was accepted by the Society and issued a Certificate of Insurance (Certificate), which initiated B.M.Y.'s insurance coverage as well as bringing about his membership in the Society. The Certificate incorporates by reference the Articles of Incorporation and the constitution and Laws of Woodmen, which in conjunction with the terms of the Certificate define the contractual relationship between members and the Society. This case centers upon the scope of a broadly worded provision in the Woodmen Constitution, discussed in detail below, that requires arbitration to resolve individual disputes between members and the Society.

Membership in the Society afforded B.M.Y. access to a Woodmen youth camp in Vermillion Parish, Louisiana. Absent his membership in the Society by virtue of the Certificate, he would not have been eligible to attend the camp. While attending the

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[1]Subpart J of the Louisiana Insurance Code, entitled "Fraternal Benefits Societies," defines a "fraternal benefit society" as "any incorporated society, order, or supreme lodge...conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and which provides benefits in accordance with this Subpart."
La. R.S. 22:281.

camp there, he was allegedly sexually assaulted by some of his fellow campers. J.R.Y. and T.S.Y (the father and mother of the minor B.M.Y.), individually and on behalf of B.M.Y.'s estate, sued the Society in Louisiana state court alleging that camp staff were negligent in failing to properly supervise the campers. J.R.Y., T.S.Y. and B.M.Y. are all resident citizens of Louisiana. The Society then brought the instant suit in the United States District Court for the Western District of Louisiana by filing a motion to compel arbitration and a motion for a temporary restraining order to stay the state court proceedings pending arbitration pursuant to the FAA, 9 U.S.C. § § 3, 4. In response, appellees (J.R.Y. and T.S.Y.) filed a FED. R. CIV. P. 12(b)(6) motion to dismiss, arguing that their tort claims were not covered by the arbitration agreement. The district court held that the dispute fell outside the scope of the arbitration agreement. Therefore the court denied the Society's motion for a temporary restraining order, declared the motion to compel arbitration moot, and granted appellees' motion to dismiss. The Society now appeals.

DISCUSSION

The Society primarily asserts that the district court erred in concluding that appellees' tort claims were not covered by the arbitration agreement. However, before we consider the scope of the arbitration agreement, we first address appellees' argument that the arbitration clause is "reverse preempted" by the Louisiana Insurance Code.

I. Reverse Preemption

For the first time on this appeal, appellees contend that, pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., the Louisiana Insurance Code reverse preempts the FAA and renders the arbitration clause void and unenforceable. Although federal law normally preempts conflicting state law, the McCarran-Ferguson Act creates a limited exception for state statutes regulating the insurance industry. *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006). The McCarran-Ferguson Act states in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). La. R.S. 22:868 provides in pertinent part as follows:

> "A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, or any group health and accident policy insuring a resident of this state regardless of where made or delivered, shall contain any condition, stipulation, or agreement:
>
> ***
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> ***
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract."

Appellees further point out that "Louisiana courts have consistently held that compulsory arbitration clauses in contracts of insurance are unenforceable under this statute because they operate to deprive Louisiana courts of jurisdiction of the action against the insurer." *Hobbs v. IGF Ins. Co.*, 834 So.2d 1069, 1071 (La. Ct. App. 3d Cir. 2002), *writ denied*, 836 So.2d 71 (La. 2003).

Ordinarily, a party waives any argument on appeal that was not raised in the district court. *Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 358 n.19 (5th Cir. 2000); *Guillory v. PPG Industries, Inc.*, 434 F.3d 303, 313 & n.37 (5th Cir. 2005). We have recognized an exception to this general rule where "[w]e will consider an issue raised for the first time on appeal...if it is a purely legal one and if consideration is necessary to avoid a miscarriage of justice." *Langhoff Props., LLC v. BP Prods. N. Am., Inc.*, 519 F.3d 256, 261 n.12 (5th Cir. 2008). Although appellees do raise a purely legal issue, we do not find that refusing to consider their reverse preemption argument here will result in a miscarriage of justice necessitating a departure from the general rule.

First of all, as a fraternal benefit society, the Society is specifically excluded from the Louisiana Insurance Code's definition of an "insurer," which includes "every person engaged in the business of making contracts of insurance, other than a fraternal benefit society." La. R.S. 22:46(10) (emphasis added). This suggests that appellees' suit against the Society is not an action against an "insurer" within the meaning of La. R.S. 22:868(A)(2). Moreover, Subpart J of the Louisiana Insurance Code, entitled "Fraternal

Benefit Societies," specifically exempts fraternal benefit societies such as the Society from the majority of the state's insurance laws: "Except as herein provided, societies shall be governed by this Subpart and shall be exempt from all other provisions of the insurance laws of this state unless they be expressly designated therein, or unless it is specifically made applicable by this Subpart." La. R.S. 22:303.

Although La. R.S. 22:868 does not expressly include fraternal benefit societies within its scope, appellees contend, for the first time at oral argument, that Subpart J specifically makes that provision applicable to fraternal benefit societies. Appellees, for the first time at oral argument, cite to La. R.S. 22:299(F), which governs benefit contracts issued by fraternal benefit societies and provides in relevant part as follows: "Every life...insurance certificate...shall meet the standard contract provision requirements not inconsistent with the Subpart [J] for like policies issued by life insurers in this state." La. R.S. 22:868 is located within Chapter 4 of the Louisiana insurance Code, which lays out the "Insurance Contract Requirements" for all insurers in the state, including life insurers.[2] Therefore, appellees contend that the "standard contract provision requirements" in Chapter 4 that do not conflict with Subpart J, including La. R.S. 22:868, are applicable to fraternal benefit societies such as the Society.

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[2]Specifically, La. R.S. 22:868 is contained within Chapter 4 of the Louisiana Insurance Code ("Insurance and Insurance Contract Requirements by Type of Insurance"), Part I ("Insurance and Policy Requirements in General").

Appellees cite no case law, from Louisiana or otherwise, in support of this argument. We are aware of only one district court case addressing a similar claim brought under a nearly identical set of Missouri statutes. *Thrivent Fin. for Lutherans v. Lakin*, 322 F. Supp. 2d 1017, 1023-24 (W.D. Mo. 2004). In *Thrivent*, the Missouri Department of Insurance (MDI) contended that a Missouri anti-arbitration statute applied to a fraternal benefit society, despite a provision in the Missouri Insurance Code exempting such organizations from the general insurance laws of the state. *Id.* MDI relied on a provision in the Missouri "fraternal code" similar to the statute cited by appellees in the instant case) which required that insurance contracts issued by fraternal benefit societies "meet the standard contract provision requirements not inconsistent with this chapter...for like policies issued by life insurers in this state." *Id.* at 1023 (quoting R.S. Mo. § 378.619(6)). Although facially appealing, this argument was ultimately rejected by the district court, which concluded that to embrace MDI's reading of the statute would undermine the unique status afforded fraternal benefit societies under Missouri law and render the exemption provision "superfluous or irrelevant" *Id.* at 1024.

The court's analysis in *Thrivent* is persuasive in many respects and it is reasonably arguable that it applies equally to the above referenced Louisiana laws. When the Louisiana Legislature drafted a separate subpart of its Insurance Code for fraternal benefit societies and exempted them from the general insurance laws of the state, the Legislature seems to have recognized that those organizations were unique

and should be governed by a different set of rules than ordinary insurance companies. Moreover, it appears that the Legislature drafted La. R.S. 22:868 with the intent of prohibiting insurance companies from compelling the arbitration of insurance claims made by policy holders. The dispute before us is not a claim for recovery on the insurance policy and does not depend so much on B.M.Y.'s life insurance policy as it does on his membership agreement as a Woodman. Therefore, the public policy concerns underpinning La. R.S. 22:868 are not strongly implicated in this case.

We accordingly conclude that the circumstances here are not such as to merit our departure from the general rule prohibiting us from considering new arguments first raised on appeal. See *Carillo v. La. Ins. Guar. Ass'n,* No. 08-30359, slip op. 1574 at 1580, _____F.3d _____ (5th Cir. Feb. 19, 2009). Therefore, we determine that, because appellees failed to raise their reverse preemption argument in the district court, they have waived that defense.

II. Scope of the Arbitration Clause

The Society claims that the district court erred in determining that appellees' tort claims fall outside the scope of the arbitration agreement. We find that, because the claims are arguably covered under the language of the agreement, we must err on the side of arbitration.

In considering whether to compel arbitration under the FAA, a court must engage in a two-step analysis. *Tittle*, 463 F.3d at 418. "First, a court must

'determine whether the parties agreed to arbitrate the dispute in question.'" *Id.* (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996)). "Second, a court must determine 'whether legal constraints external to the parties' agreement foreclose the arbitration of those claims.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3355 (1985)). Other than the improperly raised reverse preemption argument, appellees offer no external legal constraints that would preclude enforcement of the agreement. Therefore, our analysis is limited to deciding whether the parties agreed to arbitrate this dispute, which requires us to determine: "'(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.'" *Id.* (quoting *Webb*, 89 F.3d at 258).

Appellees (other than by their reverse preemption argument first raised on appeal) do not challenge the validity of the arbitration agreement, and therefore we only consider whether it encompasses their tort claims. In determining the scope of an arbitration agreement, we focus primarily on the contract itself and not "general policy goals." *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 764 (2002). Nevertheless, the federal presumption in favor of arbitration does come into play to the extent that "ambiguities in the language of the agreement should be resolved in favor of arbitration." *Id.*; see also *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 106 S.Ct. 1415, 1419 (1986). Thus, "[w]henever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration." *In re Hornbeck*

Offshore (1984) *Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (quoting *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985)).

The arbitration agreement at issue, which is contained in the Woodmen Constitution and incorporated by reference in B.M.Y.'s Certificate, provides in pertinent part as follows:

> "**Sec. 2. Resolution of Individual Disputes**
>
> **(a) Purpose.** The purpose of this Section 2 is to provide opportunities for members...and the Society to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members of the Society and without the delay and expense of formal legal proceedings.
>
> **(b) Scope**. This Section 2 shall apply whenever a member...makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member...This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society or any officer, employee or agent of the Society."

Appellees argue that the agreement only governs disputes relating to rights, privileges, or benefits

enjoyed by an individual as a member of the Society. Appellees claim that, because the right to have proper supervision at the camp was not in any way linked to membership in the Society, their suit falls outside the scope of the arbitration clause. In contrast, the Society asserts that the agreement covers *any* claim at all for damages brought by a *member* against the Society. Further, the Society argues that attendance at the Society camp was an *exclusive privilege* that B.M.Y. was *only* able to enjoy by virtue of his *membership in the Society*. Therefore, any alleged violation of "individual rights," "denial of civil rights," or "infliction of distress" by Society camp staff stemmed directly from B.M.Y.'s membership in the Society and therefore is covered under the arbitration agreement.

While we do not believe that the scope of the arbitration clause is so broad as to cover any conceivable dispute between a member and the Society,[3] we find that it is at least "fairly debatable" that appellees' claims fall within the bounds of the agreement. See *In re Hornbeck*, 981 F.2d at 755. B.M.Y. could not have attended the Society's camp if he were not a Woodman. As such, the claims arising from his alleged assault by other campers at the Society's camp he was attending solely by virtue of his membership arise, at least indirectly and not wholly fortuitously, from his membership in the Society.

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[3] Consider, for example, an automobile collision between a Society vehicle and a non-Society vehicle driven by a non-Society member in which B.M.Y. is a passenger and the presence of which on the occasion in question is wholly unrelated to anything in connection with or arising out of B.M.Y.'s membership.

Therefore, the arbitration clause is at a minimum "'susceptible of an interpretation that covers the asserted dispute,'"and we must resolve doubts in favor of coverage. See *AT&T Techs.*, 106 S.Ct. at 1419 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 80 S.Ct. 1347, 1353 (1960)).

CONCLUSION

For the foregoing reasons, we REVERSE the district court's order granting appellees' FED. R. Civ. P. 12(b)(6) motion and denying the Society's motions. Further, we REMAND the case to the district court with instructions to grant the Society's motion to compel arbitration and to stay the state proceedings pending arbitration.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY/OMAHA WOODMEN LIFE INSURANCE — CA NO: 6:08-CV-46

VERSUS — JUDGE HAIK

J.R.Y., individually and as the administrator of the Estate of his minor son, B.M.Y., and T.S.Y., mother of B.M.Y. — MAG. METHVIN

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RULING

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Plaintiff's Motion for Temporary Restraining Order [Doc. 2] is hereby DENIED.

Plaintiff's Motion to Compel Arbitration [Doc. 3] is hereby MOOT.

Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) [Doc. 10] is hereby GRANTED.

THUS DONE AND SIGNED in Lafayette, Louisiana, on this 14th day of March, 2008.

RICHARD T. HAIK, SR.
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30405

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY/OMAHA WOODMEN LIFE INSURANCE SOCIETY

Plaintiff-Appellant

v.

JRY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF HIS MINOR SON, ON BEHALF OF
BMY ESTATE; TSY, MOTHER OF BMY

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana

U.S. COURT OF APPEAL
FILED
MAY 19, 2009
CHARLES R. FULBRUGE, III
CLERK

ON PETITION FOR REHEARING EN BANC

(Opinion 03/23/09, 5 Cir., _____, _____ F.3D _____)

Before GARWOOD, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. App. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge
Form Name: Order on pet EB treat as pan reh-REHG6A

APPENDIX D

STATE OF LOUISIANA
SECRETARY OF STATE
Legal Services Section
P.O. Box 94125, Baton Rouge, LA
70804-9125
(225) 922-0415

11/13/07

WOODMEN OF THE WORLD
LIFE INSURANCE SOCIETY
MR. MARK D. THEISEN VICE
PRESIDENT/GENERAL COUNSEL
2700 WOODMEN TOWER
1700 PARNAM STREET
OMAHA, NE 68102

RECEIVED
NOV. 19 2007
GENERAL
COUNSEL

SUIT NO: 87769
15th JUDICIAL DISTRICT COURT
PARISH OF VERMILION

JOHN DOE
vs
WOODMEN OF THE WORLD LIFE INS SOCIETY

Dear Sir/Madam:

I am enclosing citation served in regard to the above entitled proceeding. Please call the attorney that filed this document if you have any questions regarding this proceeding. If you received this document in error, please return it to the above address with a letter of explanation.

APPENDIX D

FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF VERMILION
STATE OF LOUISIANA

J.R.Y., individually
and as the administrator
of the estate of his minor
son, B.M.Y. and T.S.Y.,
mother of B.M.Y.

VERSUS DOCKET NUMBER:

WOODMEN OF THE WORLD
LIFE INSURANCE SOCIETY

****

PETITION FOR DAMAGES

The petition of J.R.Y., individually and as the administrator of the estate of his minor son, B.M.Y. and T.S.Y., mother of B.M.Y. and the petition of T.S.Y., Plaintiffs, respectfully represents as follows:

1.

Plaintiffs, J.R.Y. and T.S.Y., are husband and wife and parents of B.M.Y. and are residents of, and domiciled in, Covington, St. Tammany Parish, Louisiana.

2.

Defendant, Woodmen of the World Life Insurance Society, alleged, upon information and belief, to be a Nebraska corporation that is licensed as WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY in the State of Louisiana, and is therefore a foreign corporation or other legal entity authorized

to do and doing business in the State of Louisiana; and, as a foreign insurance company, may be served through its agent for service of process, Honorable Jay Dardenne, Louisiana Secretary of State, 3851 Essen Lane, State Archives Building, Baton Rouge, Louisiana 70809.

3.

The above named Defendant is indebted to Plaintiffs to the full and true extent authorized by law and in such reasonable amounts commensurate with the damages they have sustained as a result of serious bodily harm perpetrated upon the minor child, who is a Plaintiff herein. The Defendant is also liable for legal interest from date of judicial demand on all sums awarded and for all costs of these proceedings.

4.

Plaintiffs further allege that, by reason of the substantial injuries and damages sustained, the value of their claims each exceed the monetary jurisdictional amount required for the filing of this suit in District Court. Therefore, the Fifteenth Judicial District Court for the Parish of Vermilion, Louisiana, is the Court of proper jurisdiction.

5.

The tortious conduct described herein occurred within the Parish of Vermilion, State of Louisiana, and therefore the Fifteenth Judicial District Court is the Court of proper venue for the filing of this suit.

6.

The minor child, B.M.Y., upon whose behalf his father has brought suit, was born of the marriage of J.R.Y. and T.S.Y on November 16, 1994, and at the time of the incident herein alleged was twelve (12) years old.

7.

On or about June 24, 2007, Plaintiff, J.R.Y. (father of the minor, B.M.Y.) drove the minor child to a youth camp located in Abbeville, Vermilion Parish, Louisiana. The name of the camp is South Louisiana Woodmen of the World Youth Camp.

8.

J.R.Y. and the minor child arrived at the camp at approximately 2:30 P.M. on June 24, 2007. J.R.Y. assisted the minor through the check-in procedure and assisted him in getting settled in at the child's assigned cabin No. 11. After putting linens and sleeping bags on the bed and tucking the luggage safely away near the bed, J.R.Y. and the minor child located the minor child's cousin, and both children headed toward the swimming area for swimming tests. J.R.Y. gave his son a hug and told him to have fun and to enjoy his time at the camp. J.R.Y. left the main pavilion adjacent to the pool and headed for his truck for the drive back to Covington at approximately 3:30 P.M.

9.

On June 29, 2007, T.S.Y., mother of the minor child, B.M.Y., came to Abbeville, Louisiana to pick up the minor child from the Woodmen camp and arrived there at approximately 8:30 A.M. T.S.Y. was accompanied by her own mother and her sister-in-law. When they arrived at approximately 8:30 A.M., the minor child was waiting under the pavilion for them. The minor child hugged his mother, and she asked the child to show her around. The minor child proceeded to his cabin, but the door was locked, so they proceeded to the next cabin so his mom could look inside. Thereafter, T.S.Y. and the minor child went to sign him out of the camp.

10.

During the awards ceremony, the minor child's grandmother observed that there seemed to be something wrong with the minor, B.M.Y. He did not sit with his mom and grandmother in the bleachers but instead sat on the concrete ground.

11.

Following a short visit at a relative's home, T.S.Y. and the minor child headed for home, i.e., Covington, Louisiana. As T.S.Y. drove across the Atchafalaya Basin, the minor child was awake, but very quiet. Having been told by him and his cousin that the counselors permitted cursing at the camp, T.S.Y. had told the minor that, of course, that was wrong and the minor agreed. T.S.Y. then asked the minor had anything else happened at the camp that he needed to talk about. The child remained very quiet.

12.

T.S.Y. looked over at the child and noted that tears were coming out of his eyes.

13.

T.S.Y. gently explained to her son that there was nothing in the world she could not share with him. Thereafter, the minor child told his mother that four boys in his cabin had held him down while one boy took a plastic flamingo bird and shoved it up his rectum. When questioned by the mother as to whether the inanimate object replicated as a flamingo bird had actually gone inside of him, the child replied, yes, and that it hurt.

14.

The minor child proceeded to disclose to his mother that the flamingo had been given to his cabin because they had won the cleanest cabin award. The

child reported how he had worked hard to keep the cabin clean so they could get the prize. The minor then related that some boys had broken the legs off the flamingo, and one got the idea to hold others down and shove it up the campers' rectums.

15.

The minor further related to his mother that the other boys had lifted the leg of his shorts as high as it would go and shoved the flamingo inside. The minor further related that one boy had his hand over the minor's mouth so he couldn't scream. Amazingly, as this was going on, the minor child reported that his counselor, Beau, was in the cabin on his laptop computer transferring music to his I-pod while all of this was going on.

16.

Another employee of Defendant by the name of "COOP" walked in while the boys were engaged in the activity of shoving the flamingo into the rectum of another camper and told them to stop, that they could hurt each other's insides. It is alleged that this was the full extent of any action or attention given the incidents by Defendant and its employees.

17.

When the minor, B.M.Y., first observed the five boys engaging in the offensive and horrible behavior with the flamingo, he hid on the top bunk. However, the other boys found him and pulled him down to the bottom bunk and turned him over. It was at that time that the other boys perpetrated the tortious conduct against the minor child.

18.

After the incident, the minor child, B.M.Y., went and hid under the bunk bed and put the suitcases in front of him and cried.

19.

Having heard the child's report of the horrific incident, T.S.Y. turned her vehicle around and went back to Lafayette to Women and Children's Hospital. She thereafter continued to seek and receive medical care and treatment for the minor child.

20.

The tortious conduct described herein was caused solely and proximately by the negligence of Defendant in failing to implement the appropriate safeguards and measures and/or procedures to safeguard these minor children and to protect them from the particular harm described herein and other such harmful and reprehensible behavior. The Defendant's negligence and fault further consist of the following non-exclusive particulars:

1. Failing to properly train, instruct and/or employ competent counselors with the requisite maturity and experience to safeguard the minor children in whose care they were placed;
2. Failure to implement a system whereby the children themselves had a mechanism or method to safely report offensive or tortious conduct perpetrated upon them;
3. Defendant is clearly liable under the theory of *respondeat superior* for the tortious and/or negligent conduct of its employees;
4. Defendant breached the duty it undertook to provide a safe environment for minor children so that they would be free from

sexual assault, in particular, while in Defendant's care;

5. Permitting such other acts or omissions which will be shown at the trial of the matter.

21.

Plaintiffs were all totally free from fault in causing the tortious conduct made subject of this action.

22.

As a result of the tortious conduct complained of herein, the minor child has sustained immeasurable injury. The minor child was physically traumatized and continues to struggle with emotional and mental damage of the greatest degree in that he intimated suicide. The child has required, needs, and continues to have counseling in order to deal with the anger which has built up inside of him and which has spilled out to his relationships with each of his family members.

23.

The minor child has nightmares about being back at the camp and afterward jumping from the Mississippi River bridge.

24.

Additionally, the minor child, though extremely bright, has been diagnosed as having Attention Deficit Hyperactivity Disorder. He was, however, prior to this incident, a very bright child with a positive attitude. He was a lover of the outdoors and was happy to participate in activities such as football, hunting, fishing, skateboarding, and just about any activities that allowed him to be active and outside. The minor child has always been an active child who was also very sociable and very popular with other

children in the neighborhood, in school and other public settings.

25.

The incident and tortious conduct perpetrated upon him has had and will continue to have devastating effects in the past, now, and throughout his life. The tortious conduct complained of herein has effectively stolen the innocense from this minor child.

26.

Additionally, J.R.Y. and B.M.Y., the parents of the minor child have been emotionally traumatized by the incident which was perpetrated on their young minor child. Their family life and relationships between family members has been made difficult and emotionally trying as they struggle to learn and to understand how to deal with the traumatic incident which confronts them all. As a result, they have had to seek counseling of their own to become better equipped to learn to deal with their child's trauma and their own trauma.

27.

All of the Plaintiffs herein have sustained the following non-exclusive damages as a result of the accident:

A. Physical, emotional and mental pain and suffering;
B. Loss of enjoyment of life, and
C. Past, present and future medical expenses which will be incurred for the parents and the minor child.

WHEREFORE, Plaintiffs pray that:

1. Defendant be served with a copy of this Petition and cited to appear and answer

same within the time provided by law;

2. After all legal delays and due proceedings had, there be Judgment herein in favor of Petitioners and against Defendant in such amounts as are reasonable in the premises, together with legal interest thereon from date of judicial demand, until paid, and

3. For all costs of these proceedings.

LAWRENCE N. CURTIS, LTD.
(A Professional Law Corporation)
300 Rue Beauregard, Bldg. C
Post Office Box 80247
Lafayette, Louisiana 70598-0247
Telephone: (337) 235-1825
Facsimile: (337) 237-0241

BY: s/Lawrence N. Curtis
LAWRENCE N. CURTIS (4678)

and

SUE FONTENOT, APLC
Sue Fontenot, Esq.
400 South State Street
Abbeville, Louisiana 70510
Telephone: (337) 893-8104
Facsimile: (337)893-8105

PLEASE SERVE:

Woodmen of the World
Life Insurance Society
through its agent for service
of process:
Hon. Jay Dardenne
Louisiana Secretary of State
8549 United Plaza Blvd.
Baton Rouge, Louisiana 70809

Vermilion Parish, La.
Filed This Day:
2007 OCT 31 A913
Diane Meaux Broussard
Clerk of Court

APPENDIX E

PART 2 - THE CONTRACT

CONTRACT

The contract between the member and Woodmen consists of:

- This certificate.
- The written application, a copy of which is attached to this certificate.
- The Articles of Incorporation of Woodmen.
- The Constitution and Laws of Woodmen.

The Articles of Incorporation and the Constitution and Laws and any amendments to them are binding on the member and the beneficiary but will not take away or reduce any of the benefits of this certificate.

This certificate is granted in consideration of the application and the timely payment of premiums.

MODIFICATION

Only Woodmen may change, reduce or add to the terms of this certificate. Any change must be in writing and signed by the President or Secretary of Woodmen. No one else has the right to modify this certificate.

DATES

The date of issue and the certificate are shown on page 2. All premium payment periods and certificate years will be timed from the certificate date.

STATEMENTS IN THE APPLICATION

Statements made by or for the member in the application are by law representations and not warranties. Only statements signed by the applicant and attached to this certificate can be used to contest this certificate.

INCONTESTABILITY

This certificate will be incontestable after it has been in force while the member is alive for two years from the date of issue. If this certificate is reinstated and proof of insurability is required, it will again be contestable. Any contest will be limited to written statements made to gain reinstatement. After the certificate has been in force for two years while the member is alive following reinstatement, it will be incontestable. See PART 3, REINSTATEMENT.

APPLICABLE STATE LAW

The terms of this certificate will be governed by the laws of the state in which it is delivered.

APPENDIX F

Sec. 2. Resolution of Individual Disputes.

(a) Purpose. The purpose of this Section 2 is to provide opportunities for members, benefit certificate owners, beneficiaries, payors and the Society to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members, benefit certificate owners, beneficiaries or payors, consistent with the fraternal nature of the Society and without the delay and expense of formal legal proceedings. This Section 2 is intended to apply to all current and future members, benefit certificate owners, beneficiaries and payors, and to all current and future benefit certificates.

(b) Scope. This Section 2 shall apply whenever a member, benefit certificate owner, beneficiary or payor of the Society makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member or benefit certificate owner or beneficiary or payor. This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society; and includes disputes regarding the denial of benefit claims under any certificate to the extent procedures of this Section 2 are not prohibited by applicable law. No lawsuit may be filed against the Society or any officer, employee or agent of the Society on any dispute covered by this Section 2 until the procedures described herein have been exhausted; and a lawsuit may then be filed only if the applicable law does not recognize the procedures herein to be final and

binding with respect to the matter in dispute. The scope of this paragraph is intended to include any and all claims of any nature that the Society might wish to invoke against a member or benefit certificate owner or beneficiary or payor regarding individual rights, privileges or benefits claimed by a member or benefit certificate owner or beneficiary or payor . Nothing contained herein shall be deemed to supersede the provision sof Article 7, Sec. 8 of this Constitution and Laws.

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(2)

No. 09-207

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

J.R.Y., individually and as the administrator of the estate of his minor son, B.M.Y.; and T.S.Y., mother of B.M.Y.,

Petitioners,

v.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JEREMY FITZPATRICK*
KATHRYN E. JONES
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186
Telephone: (402) 346-6000
Facsimile: (402) 346-1148
**Counsel of Record*

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Respondent Woodmen of the World Life Insurance Society has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The Petition for Writ of Certiorari ("Petition") should be denied because it presents no issue worthy of the Court's attention. In an unpublished opinion, the United States Court of Appeals for the Fifth Circuit held Petitioners' negligence claims against Respondent fell within the broad scope of the parties' arbitration agreement, and, although Petitioners had waived the argument, the Louisiana Insurance Code's anti-arbitration provision would not reverse preempt the FAA under the McCarran-Ferguson Act.

Petitioners fail to demonstrate the Fifth Circuit's opinion conflicts with any decision of this Court or any other court. Indeed, Petitioners have alleged no split of authority whatsoever. The Court should deny review for that reason alone.

The Fifth Circuit's opinion also lacks extraordinary factors to justify review. To the contrary, the opinion is unpublished, fact specific to this case, and provides no new or extended legal principles that may set precedent for other cases. Moreover, the Fifth Circuit correctly applied well established precedent in resolving the merits of this case, and its decision comports with decisions from other courts. Therefore, this case does not merit review by this Court.

In sum, Petitioners have failed to carry their burden to show any compelling reasons for the Court to grant the Petition. Because none of the criteria warranting review on a writ of certiorari are present

in the Petition, Respondent respectfully requests the Court deny the Petition.

STATEMENT OF THE CASE

A. Factual Background

Respondent is a fraternal benefit society. Fraternal benefit societies generally are non-profit organizations governed by a representative form of government that are dedicated to fraternal, charitable, and patriotic goals. When a fraternal benefit society such as Respondent issues a person a certificate of insurance, the person becomes a fraternal member of the society and is entitled to the privileges and benefits of society membership.

Respondent issued Petitioner B.M.Y. a certificate of insurance, at which time he became a fraternal member of Respondent. The relationship between Respondent and Petitioner B.M.Y. was governed by a contract containing a broad arbitration clause that requires arbitration "whenever a member . . . of [Respondent] makes a claim for damages, or claims any form of redress for a violation of his or her individual rights."

Petitioner B.M.Y. attended a private youth camp affiliated with Respondent. Participation in the camp was limited exclusively to members of Respondent. While Petitioner B.M.Y. attended the camp, other youths at the camp allegedly sexually assaulted him.

The question in this case is whether the parties' arbitration agreement encompassed Petitioners' negligence claims relating to the alleged assault of Petitioner B.M.Y. by other youths at the camp.

B. Procedural Background

Based on the alleged assault that occurred while Petitioner B.M.Y. attended the youth camp, Petitioners filed a negligence action against Respondent in Louisiana state court (the "State Court Action"). Respondent subsequently filed a Complaint in the United States District Court for the Western District of Louisiana, seeking an order compelling arbitration of the claims raised in the State Court Action.

The District Court held the parties' dispute fell outside the scope of the arbitration agreement, granted Petitioners' motion to dismiss, denied Respondent's motion for a temporary restraining order, and denied Respondent's motion to compel arbitration as moot. Respondent timely appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal to the Fifth Circuit, Petitioners asserted two arguments. For the first time on appeal, Petitioners argued that, under the McCarran-Ferguson Insurance Regulation Act (the "McCarran-Ferguson Act"), 15 U.S.C. §§ 1011 to 1015, the Louisiana Insurance Code's anti-arbitration provision "reverse preempted" the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1 to 16, thereby rendering the arbitration agreement void and unenforceable.

Petitioners also argued their claims in the State Court Action fell outside the scope of the arbitration agreement.[1] At no time did Petitioners challenge the existence of the contract containing the arbitration agreement.

In an unpublished opinion, the Fifth Circuit reversed the District Court. Although Petitioners had failed to raise the argument before the District Court, the Fifth Circuit analyzed whether the Louisiana Insurance Code's anti-arbitration provision applied to fraternal benefit societies such as Respondent. In its analysis, the Fifth Circuit noted the Louisiana Insurance Code expressly exempted fraternal benefit societies from the definition of "insurer" and from the state's general insurance laws, which exemptions indicated the Louisiana Legislature had recognized fraternal benefit societies are unique and should be governed by a different set of rules than ordinary insurance companies. The Fifth Circuit thus found the public policy concerns underpinning the Louisiana Insurance Code's anti-arbitration provision were not strongly implicated in this case. Because refusing to consider Petitioners' reverse preemption argument would not result in a miscarriage of justice, the Fifth Circuit concluded Petitioners had waived

---

[1] Petitioners did not argue on appeal to the Fifth Circuit that Respondent somehow accomplished a "backdoor removal" of the State Court Action, an argument that Petitioners raise in the Petition.

the argument by failing to raise it before the District Court.

Holding Petitioners' claims in the State Court Action arguably fell within the broad scope of the arbitration agreement, and given the presumption in favor of arbitration, the Fifth Circuit remanded the case to the District Court with instructions to grant Respondent's motion to compel arbitration and stay the State Court Action pending arbitration. The Fifth Circuit denied Petitioners' Petition for Rehearing En Banc, and this Petition followed.

REASONS FOR DENYING THE PETITION

Review on a writ of certiorari is not a matter of right, but one of judicial discretion. *See* Sup. Ct. R. 10. As such, a petition for a writ of certiorari may be granted only where a petitioner demonstrates "compelling reasons" for such action. *Id.* As discussed below, Petitioners present no compelling reasons for the Court to grant the Petition.

A. Petitioners Fail To Identify Any Conflict

The Court should deny the Petition because Petitioners fail to identify any conflict among the lower courts. "A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts

concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

Petitioners do not contend a conflict exists among the lower courts that this Court should resolve.[2] More specifically, Petitioners do not allege the Fifth Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Absent such a conflict, the Court should deny the Petition.

B. The Fifth Circuit's Decision Was Unpublished And Narrowly Tied To The Unique Facts Of This Case

The decision below was unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than these Petitioners and this Respondent. In addition, as outlined below, this case presents unique facts and circumstances that make it a particularly poor candidate for review.

---

[2] Petitioners do not even attempt to allege a split of authority. That is because no such split exists. To the contrary, as outlined in Section D below, the Fifth Circuit's unpublished decision conforms with longstanding principles and precedent, and it is consistent with decisions from other courts.

1. Respondent is a fraternal benefit society, not an insurance company.

Petitioners contend "the essential transaction in this case involved the purchase of a life insurance policy, nothing more and nothing less." (Pet. 13). Petitioners are wrong.

Respondent is not an insurance company. Rather, it is a fraternal benefit society. As the Fifth Circuit recognized, a fraternal benefit society is unlike an insurance company. (Pet. App. 8-9). A fraternal benefit society generally is a non-profit organization conducted solely for the benefit of its members and beneficiaries. As a fraternal benefit society, Respondent operates under a lodge system and a representative form of government, and it aspires to achieve fraternal ideals through family, civic, charitable and patriotic activities. For example, its youth members are granted access to the privileges and benefits of Respondent's youth programs and activities, such as attending youth camps. Indeed, this Court has recognized fraternal benefit societies have a unique status under the law, differentiating them from insurance companies. *See Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925) (recognizing "[t]he act of becoming a member [of a fraternal benefit society] is something more than a contract, it is entering into a complex and abiding relation"); *see also Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 606 (1947) ("The fact of membership in . . . [a] fraternal benefit

society is the controlling and central feature of the relationship.").

Given the unique legal status of fraternal benefit societies and the significant differences between fraternal benefit societies and insurance companies, the Fifth Circuit's unpublished decision in this case has no possible application to cases involving insurance companies. Therefore, review by this Court is particularly unwarranted.

2. The decision below was limited to the specific factual nature of the parties' underlying dispute.

The parties' underlying dispute involved the allegation that while Petitioner B.M.Y. attended youth camp, he was assaulted by other youths at the camp. The Fifth Circuit's decision held only this particular dispute was arbitrable. Indeed, the Fifth Circuit made clear its decision would not apply to every "conceivable dispute between a member and [Respondent]," such as a dispute involving "an automobile collision between a [Respondent] vehicle and a non-[Respondent] vehicle driven by a non-[Respondent] member in which B.M.Y. is a passenger and the presence of which on the occasion in question is wholly unrelated to anything in connection with or arising out of B.M.Y.'s membership [in Respondent]." (Pet. App. 12, n.3). As the decision below was expressly limited to the parties' specific underlying dispute, the Court should deny the Petition.

3. The decision below was dependent on the particular terms of the arbitration agreement at issue.

The arbitration agreement at issue provides in pertinent part as follows:

> **Sec. 2. Resolution of Individual Disputes**
>
> **(a) Purpose.** The purpose of this Section 2 is to provide opportunities for members . . . and the Society to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members . . . of the Society and without the delay and expense of formal legal proceedings.
>
> **(b) Scope.** This Section 2 shall apply whenever a member . . . makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member. . . . This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society.

(Pet. App. 30-31). Any determination of the arbitrability of the parties' underlying dispute necessarily is tied to the particular terms of this arbitration agreement and will offer little guidance to courts

dealing with the near infinite array of other arbitration provisions that may be at issue in future cases.

In sum, the narrow scope of the unpublished decision below is based on the unique characteristics of fraternal benefit societies, the specific factual nature of the parties' underlying dispute, and the particular terms of the arbitration agreement at issue. Because this case involves a fact-bound dispute whose resolution is not of importance to anyone other than the immediate parties, the Court should deny the Petition.

C. The Petition Raises A Narrow State Law Issue

Petitioners argue the McCarran-Ferguson Act reverse preempts application of the FAA because the Louisiana Insurance Code's anti-arbitration provision prohibits mandatory arbitration of claims against insurers. (Pet. 16). This argument does not provide a basis for granting certiorari. As noted herein, Petitioners waived the reverse preemption argument by failing to raise it before the District Court. Furthermore, Petitioners' argument would require the Court decide a matter that pertains almost solely to state law.

The McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .

unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). "[T]he McCarran-Ferguson Act provides a narrow exception to [application of the FAA] for state laws governing the insurance industry." *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006). Thus, under the McCarran-Ferguson Act, a state law that specifically regulates the business of insurance may reverse preempt the FAA. *Id.*

The Louisiana Insurance Code prohibits an "insurance contract" from containing a mandatory arbitration clause. La. Rev. Stat. § 22:868. The anti-arbitration provision contained in La. Rev. Stat. § 22:868, however, does not apply to fraternal benefit societies. The Louisiana Insurance Code contains a separate subpart for fraternal benefit societies, and the Louisiana Insurance Code specifically exempts fraternal benefit societies from the definition of an "insurer." La. Rev. Stat. § 22:46(10) ("'Insurer' includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society."). In addition, the Louisiana Insurance Code expressly exempts fraternal benefit societies "from all other provisions of the insurance laws of this state." La. Rev. Stat. § 22:303.

Because no Louisiana court had addressed whether the Louisiana Insurance Code's anti-arbitration provision contained in La. Rev. Stat. § 22:868 applies to fraternal benefit societies such as Respondent, the Fifth Circuit analyzed the Louisiana Legislature's intent in exempting fraternal benefit

societies from Louisiana insurance laws. The Fifth Circuit reasoned, "it appears that the [Louisiana] Legislature drafted La. [Rev. Stat. §] 22:868 with the intent of prohibiting insurance companies from compelling the arbitration of insurance claims made from policy holders." (Pet. App. 9). The Fifth Circuit further reasoned, "[w]hen the Louisiana Legislature drafted a separate subpart of its Insurance Code for fraternal benefit societies and exempted them from the general insurance laws of the state, the Legislature seems to have recognized that those organizations were unique and should be governed by a different set of rules than ordinary insurance companies." (*Id.* at 8-9). The Fifth Circuit then concluded, "the public policy concerns underpinning La. [Rev. Stat. §] 22:868 are not strongly implicated in this case." (*Id.* at 9). Based on this conclusion, the Fifth Circuit determined the McCarran-Ferguson Act would not reverse preempt the FAA, and, accordingly, no miscarriage of justice would result from finding Petitioners had waived the reverse preemption argument by failing to raise it before the District Court. (*Id.*).

Reviewing the Fifth Circuit's decision with regard to Petitioners' reverse preemption argument would require the Court to discern and apply the Louisiana Legislature's intent. The Supreme Court, however, does not have a stake in the correctness of federal decisions that are premised on resolution of underlying state-by-state decisions (in this case, the Louisiana Insurance Code's anti-arbitration

provision). *See Lawrence v. Chater*, 516 U.S. 163, 176-77 (1996) (Rehnquist, C.J., concurring and dissenting in part). The Court, therefore, should deny the Petition.

D. The Fifth Circuit's Decision Was Consistent With Other Authority

Having failed to identify any split of authority or other compelling reasons warranting certiorari, the Petition merely constitutes a challenge to the Fifth Circuit's application of well settled authority to the unique facts of this case. Because, as outlined below, the Fifth Circuit's decision did not depart from any well established law, the Court should deny the Petition.

1. The Fifth Circuit applied well settled law in determining whether the parties' dispute fell within the scope of the arbitration agreement.

The Fifth Circuit applied the correct law in determining the arbitrability of the parties' underlying dispute. Because the Fifth Circuit's decision did not "so far depart[ ] from the accepted and usual course of judicial proceedings," the Court should deny the Petition. Sup. Ct. R. 10(a).

Citing its own precedents, the Fifth Circuit properly stated the correct rules of law concerning arbitrability. First, the court must determine whether the parties agreed to arbitrate the dispute. (Pet. App.

9-10). This first inquiry requires consideration of (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the dispute in question falls within the scope of the arbitration agreement. (*Id.* at 10). Second, the court must consider whether any federal statute or policy renders the claim nonarbitrable. (*Id.*). The Fifth Circuit further recognized the strong federal presumption in favor of arbitration, which requires that where the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court must decide in favor of arbitration. (*Id.* at 10).

Correctly applying its own precedents, the Fifth Circuit held the arbitration agreement at issue was, "at a minimum," susceptible of an interpretation covering the parties' underlying dispute. (Pet. App. 13). In so holding, the Fifth Circuit recognized Petitioner B.M.Y. could not have attended the youth camp if he were not a member of Respondent. (*Id.* at 12). As such, the claims arising from the alleged assault at the camp he attended "solely by virtue of his membership" arose "at least indirectly and not wholly fortuitously," from his membership in Respondent. (*Id.*). Accordingly, it was "at least fairly debatable" that the underlying dispute fell within the bounds of the arbitration agreement at issue, which requires arbitration of claims stemming from membership in Respondent. (*Id.*) (internal quotation omitted).

No reason exists for the Court to review the Fifth Circuit's holding that the parties' underlying dispu

fell within the broad scope of the arbitration agreement at issue. The Fifth Circuit's approach conformed with long-standing principles and precedent. As a result, Petitioners are reduced to arguing the Fifth Circuit should have come to different conclusions based on the particular facts of this case. For example, Petitioners argue the parties' underlying dispute "can be maintained without reference to the life insurance contract" and "does not fall within the parameters" of the arbitration agreement. (Pet. 14-15). Petitioners thus ask the Court to disregard the findings made by the Fifth Circuit and conduct a de novo review of the arbitrability rules to the factual allegations and contract language at issue in this specific case.

Petitioners' fact-based arguments do not merit the Court's review pursuant to Supreme Court Rule 10. As discussed in Section B above, the determination of whether a dispute falls within the scope of an arbitration agreement is a highly factual analysis. The result is driven by the factual nature of the dispute and the particular terms of the arbitration agreement at issue. Depending on the varying factual scenarios and contract language presented by each case, different outcomes will result from application of the rules of law concerning arbitrability.

Taken together, the inherently fact-specific nature of the questions presented and the correctness of the Fifth Circuit's approach make this case a particularly unsuitable candidate for further review. The Court, therefore, should deny the Petition.

2. The decision below did not depart from any well established law in determining whether the arbitration agreement was unenforceable under the McCarran-Ferguson Act.

In determining the Louisiana Insurance Code's anti-arbitration provision would not reverse preempt the FAA under the McCarran-Ferguson Act (and, as a result, no miscarriage of justice would result from finding Petitioners had waived the argument), the Fifth Circuit's decision comports with other courts' decisions addressing whether state anti-arbitration provisions apply to fraternal benefit societies for purposes of reverse preemption under the McCarran-Ferguson Act. *See Thrivent Fin. for Lutherans v. Lakin*, 322 F. Supp. 2d 1017, 1021 (W.D. Mo. 2004) (holding fraternal benefit societies were not subject to Missouri statute prohibiting arbitration of controversies related to insurance, therefore, McCarran-Ferguson Act did not reverse preempt application of FAA); *Aid Ass'n for Lutherans v. Radmer*, No. 99-C-1205, 2001 WL 34388864, at *9 (E.D. Wis. Oct. 31, 2001) ("[T]he FAA is applicable to fraternal benefit societies, notwithstanding the Missouri exception to the enforceability of arbitration clauses pertaining to insurance contracts, because that rule does not expressly state that it applies to fraternal benefit societies."); *Cox v. Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 402 (S.C. Ct. App. 2001) (holding South Carolina's statute that invalidated arbitration provisions in insurance policies "is not applicable to

fraternal benefits associations" because "[t]he general insurance laws of this State do not apply to fraternal benefits associations"); *Woodmen of World Life Ins. Soc'y v. Harris*, 740 So. 2d 362, 366-67 (Ala. 1999) (holding McCarran-Ferguson Act did not prevent FAA from applying to arbitration clause in insurance certificate issued by fraternal benefit society, because statutory invalidation of arbitration agreements was not intended to apply to fraternal benefit societies). Because the decision below is in harmony with decisions of other courts, no basis exists for granting certiorari.

E. Petitioners' So-Called "Backdoor Removal" Argument Is Not Properly Before The Court

Petitioners argue "respondent's complaint to compel arbitration was simply a thinly-veiled attempt to accomplish an untimely 'backdoor removal' of a pending state court action." (Pet. 10). Apparently recognizing they failed to raise this so-called "back-door removal" argument (an argument that neither this Court nor any court of appeals has accepted) before the Fifth Circuit, Petitioners also argue "the Court of Appeals deviated from this Court's established precedent, when it refused to take into account all of the petitioners' arguments advanced in support of the district court's decision." (*Id.* at 9).

In arguing the Fifth Circuit violated the "well-settled principle" that a correct decision below must

be affirmed, even if the lower court relied on the wrong reasons, Petitioners fail to identify "all of the petitioners' arguments" that the Fifth Circuit "refused to take into account." As discussed below, however, none of Petitioners' arguments warrant certiorari.

To the extent Petitioners contend the Fifth Circuit failed to take into account their so-called "backdoor removal" argument, such contention fails because this argument is not properly before the Court. A fundamental rule of practice is that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (issues not raised or addressed by court of appeals ordinarily will not be considered). The Court, therefore, should refuse to consider Petitioners' so-called "backdoor removal" argument on the basis it is an improper and futile attempt to raise an issue not asserted or passed upon by the Fifth Circuit. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) ("Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below . . . it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." (internal citation omitted)).

Furthermore, even if Petitioners' so-called "backdoor removal" argument were properly before the Court (which it is not), this argument still would not warrant certiorari because neither this Court nor any court of appeals ever has recognized this argument. *See Transocean Offshore USA, Inc. v. Catrette*, 239 F. App'x 9, 13 (5th Cir. 2007) ("As for the district court's concern about a constructive removal, this court has found no Supreme Court or court of appeals opinion that even recognizes constructive removal."). Thus, Petitioners' so-called "backdoor removal" argument would not provide a basis for affirming the District Court's decision.

Finally, to the extent Petitioners assert the Fifth Circuit erred in concluding Petitioners had waived the reverse preemption argument by failing to raise it before the District Court, such assertion fails. The Fifth Circuit fully analyzed Petitioners' reverse preemption argument despite Petitioners' failure to raise it before the District Court. Indeed, only after concluding that refusing to consider Petitioners' reverse preemption argument would not result in a miscarriage of justice did the Fifth Circuit hold Petitioners had waived the argument by failing to raise it before the District Court. (Pet. App. 9). The Fifth Circuit thus took into account all of Petitioners' arguments advanced in support of the District Court's decision.

CONCLUSION

Petitioners have failed to establish any compelling reasons for the Court to grant the Petition. Therefore, Respondent respectfully requests the Court deny the Petition.

Dated: October 16, 2009

Respectfully submitted,

JEREMY FITZPATRICK*
KATHRYN E. JONES
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186
Telephone: (402) 346-6000
Facsimile: (402) 346-1148
*Counsel of Record

Counsel for Respondent